

**5982. Misbranding and alleged adulteration of "Maple Etta Syrup." U. S. \* \* \* v. Burton Lee Johnson and Samuel Russell Rambo (B. L. Johnson & Co.). Tried to the court and a jury. Verdict of guilty, as to count two of the information. Fine, \$150. Verdict of not guilty as to count one of the information. (F. & D. No. 8360. I. S. No. 1924-m.)**

On August 28, 1917, the United States attorney for the Eastern District of Tennessee, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against Burton Lee Johnson and Samuel Russell Rambo, doing business as B. L. Johnson & Co., Knoxville, Tenn., alleging shipment by the said defendants, in violation of the Food and Drugs Act, on or about June 24, 1916, from the State of Tennessee into the State of Georgia, of a quantity of an article labeled in part, "Maple Etta Syrup," which was adulterated and misbranded.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed the following results:

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|---|-------|
| Moisture, by refractometer (per cent)-----                  | 33.96 |
| Ash, total (moisture free basis) (per cent)-----            | 0.075 |
| Ash, soluble in water (moisture free basis) (per cent)----- | 0.069 |
| Ash, insoluble in water (moisture free basis) (per cent)--- | 0.006 |
| Winton lead number-----                                     | 0.35  |
| Malic acid: None.   |       |
| Sucrose (Clerget) (per cent)-----                           | 64.8  |
| Glucose: None.  |       |
| Reducing sugars (per cent)-----                             | 0.46  |
| Vanillin: Negative.   |       |
| Coumarin: Negative.   |       |
| Taste resembles maple sirup.                                |       |

The above analysis shows that the product contains very little or no maple sugar.

Adulteration of the article was alleged in the first count of the information for the reason that an imitation product containing no maple sirup had been substituted for maple sirup, which the article purported to be.

Misbranding of the article was alleged in the second count of the information for the reason that the statement and design, to wit, "Maple Etta Syrup," borne on the label thereof, regarding the article and the ingredients and substances contained therein, was false and misleading in that it represented to purchasers that the article consisted of maple sirup, and for the further reason that it was labeled as aforesaid so as to deceive and mislead purchasers into the belief that it was maple sirup, whereas, in truth and in fact, it did not so consist, and was not maple sirup, but was an imitation product containing no maple sirup, and this false and misleading impression and representation and deceptive and misleading labeling were not corrected by the statement in inconspicuous type, "Produced by the delicate blending of sugar sirup, cane and maple etta syrups," appearing on the label.

On December 10, 1917, the case came on for trial before the court and a jury, and after the submission of evidence and arguments by counsel, the following charge was delivered to the jury by the court (Sanford, *D. J.*):

Gentlemen of the Jury: You are, in trying this criminal information, to give the defendant the benefit of the presumption of innocence, just as in trying an indictment. You are to carefully weigh and consider all evidence in the case. If it satisfies you of the guilt of the defendants, or either of them, beyond a reasonable doubt, it would be your duty to bring in a verdict accordingly; if

it does not satisfy you of their guilt, or leaves in your mind a reasonable doubt of their guilt, from the evidence, you should bring in a verdict of not guilty.

As I say, I direct a verdict of not guilty under the first count. I submit to you the question as to whether there is guilt under the second count. Each side, as you have heard, has asked for peremptory instructions in its favor. I have overruled both motions, both of the Government and of the defendants, and submit the matter to be decided by the jury.

This information is based under the Food & Drugs Act; an Act passed by Congress for the prevention of the shipment in interstate commerce of adulterated and misbranded foods, drugs and the like. One provision of this Act is that the food shall not be misbranded; that is, it shall not be labeled or branded so as to deceive or mislead the purchaser. Now it is under this clause of the Food and Drugs Act that the question of the guilt or innocence of these defendants must be determined. A good many of the matters here are admitted and are not in dispute. It is admitted that the defendants were partners and that they shipped the cans of sirup charged in the information, in interstate commerce, from Knoxville, Tennessee, to the State of Georgia. It is conceded that these cans were labeled in the words and figures set forth in the information; and one of the original cans, with the original label, has been exhibited to you in evidence. It is also, as I understand, not disputed that the two defendants had knowledge of the fact that this sirup did not contain any maple and was not maple sirup; and it was stated by their counsel in argument that the only question in the case for the jury's determination is whether or not this sirup was labeled so as to mislead or deceive the purchaser. In other words, the only question is this question of fact as to the label. Now you have heard the evidence as to this matter. You are to carefully weigh and consider the same. You are to look at the label yourself, which has been introduced in evidence. The label, as you have seen, has the name "Maple" in large letters; the word "Etta" in smaller letters underneath it and to the right, without any hyphen; and the word "Syrup" in a little larger letters than the letters in the word "Maple." Below that are words "Produced by the delicate blending of refined sugar syrup, cane and maple etta syrups." These are in much smaller letters. The word "maple etta" as written in that small type seems to me to be really two words, that is there seems to be a larger space between the two "e's" than between the other letters; I am not sure about that, however. There is no hyphen certainly between the word "maple" and the word "etta." Still further down on the label and in still smaller letters and figures are the words "Over 99% pure." There are other things on the label not necessary to be called to your attention.

Now the Government insists that, taking that label as a whole, especially considering the way in which the words "Maple" and "Syrup" are printed, with the type and size of the letters, and the way in which the word "Etta" is written underneath the word "Maple," with the design of maple leaves, or something in the nature of maple leaves, around it, deceives and misleads purchasers into the belief that it is maple sirup. That is the issue that is submitted to you. Does that label that you have before you deceive and mislead; is it so labeled as to so deceive and mislead the purchaser into the belief that he is getting maple sirup? As a matter of fact it is conceded that he is not getting maple sirup. It is not a question as to whether any purchaser has been actually deceived or not; the Government does not have to show that. It is not a question of the actual intention of the defendants to deceive. It is a question simply of whether the label, taken as a whole, as it is upon the can and as offered to the purchaser for sale, is reasonably calculated to deceive and mislead the average purchaser into the belief that he is getting maple sirup. Is that its natural effect? If the natural effect of that label, when you take it as a whole and look at it as the average ordinary purchaser would look at it, is to deceive such an ordinary average purchaser into the belief that he is getting maple sirup, when he is not, then this shipment in interstate commerce was a violation of the act.

Now you have to consider all circumstances in this case, and put yourself, in so far as you can, in the position of an ordinary average purchaser who goes to a store to buy sirup. Now it is not a question of what a very careful man would do about it or would think about it; it is not a question of what a very careless man would think about it; it is a question what the ordinary average purchaser would believe when he saw this label, what he would reasonably be expected to think when he looks at it. You are to determine whether he would read the whole label, read it all, or only the large letters. What would the

average ordinary purchaser do; would the average ordinary purchaser be deceived? You are to take into consideration all the circumstances bearing on that question, the label itself, the placing of the letters, and the size of the letters, and determine what would be the natural effect of that label on the ordinary average person.

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Now then take that label and determine for yourself just how much the ordinary average purchaser would read and how much he would notice about it, and whether that ordinary average purchaser would be led into the belief that he was getting maple sirup, as indicated by the large letters or would read it all and see other things, and be led into the belief that he was not getting maple sirup? What effect, if read further would that "Over 99% pure" have on it? Would that lead him still further to believe that he was getting maple sirup? What effect would those other words about how it is produced, blended etc., have on the ordinary purchaser; would he notice them, would he pay any attention to them, would he read them, and what effect would they have upon him? You have got to put yourself, as I say, in the position of an ordinary average purchaser.

If the label taken as a whole, the words and everything, is reasonably calculated to deceive such an average ordinary purchaser then this shipment in interstate commerce by persons knowing its contents and knowing what sort of label it had, would be a violation of the act. If you are satisfied of that, beyond a reasonable doubt, as to either or both of these defendants, it would be your duty to bring in a verdict of guilty. If you are not satisfied, or have a reasonable doubt about it, it would be your duty to acquit.

Take the case, Gentlemen.

Thereupon the jury retired, and, after due deliberation returned a verdict of guilty on December 11, 1917, upon the second count of the information, and on December 13, 1917, the court imposed a fine of \$100 upon the defendant Johnson and a fine of \$50 upon the defendant Rambo. By direction of the court a verdict of not guilty was returned upon the first count of the information charging adulteration of the article.

CARL VROOMAN, *Acting Secretary of Agriculture.*